Cirker's Moving & Storage Co., Inc. *and* John B. Murray. Case 2–CA–25169

May 27, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 22, 1993, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions,[1] a supporting brief, and a reply brief and the General Counsel filed a brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified.[3]

[1] The Respondent excepts to the judge's decision only with regard to his recommendation that backpay and reinstatement be ordered. Specifically, the Respondent argues that Sec. 10(c) of the Act precludes the Board from awarding discriminatee Murray backpay and reinstatement and that the purposes of the Act would not be effectuated by his reinstatement.

Contrary to the Respondent, Sec. 10(c) does not preclude the Board from ordering that discriminatee Murray be reinstated. Sec. 10(c) prevents the Board from providing a remedy for an employee's discharge if that discharge was for cause. Here, the judge found, and we agree, that Respondent violated Sec. 8(a)(3) and (1) by conditioning Murray's return to work on his agreement to forego certain union activity (i.e., serving as shop steward). The lawfulness of Murray's prior discharge is not before us. We make no finding nor order any remedy, regarding that discharge. However, to remedy the violation found (unlawfully conditioning reinstatement), reinstatement with backpay, from the date of the violation, is proper. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187–189 (1941). See also *Allis Chalmers Corp*., 231 NLRB 1207 (1977).

[2] *Aces Mechanical Corp*., 282 NLRB 928 (1987), enf. denied 837 F.2d 570 (2d Cir. 1988), relied on in part by the judge, is distinguishable from the present case with regard to the issue of deferral. The court in *Aces Mechanical* specifically determined that the minutes of the arbitral hearing established that the arbitrators were presented with evidence concerning the subject matter of the charge (an offer of reinstatement conditioned on surrendering the union steward position) and thus the court concluded that the Board erred by failing to defer to the arbitration award. In contrast, in the instant case, the parties stipulated that the alleged settlement offer with regard to Murray was not raised at the arbitration hearing by any party. As the judge found, no evidence was submitted and the arbitrator did not hear or consider the settlement offer that is the subject of this proceeding. Hence, the judge correctly found that the issues before the arbitrator and the unfair labor practice issue here are not factually parallel.

[3] The judge included an order to expunge any reference to discriminatee Murray's discharge from the Respondent's files. Inasmuch as the discharge was neither alleged nor found to be unlawful, the expunction remedy is inappropriate and we shall delete it from the recommended Order.

In this regard, we believe that *Retlaw Corp*., 310 NLRB 984 (1993), is distinguishable. In that case, the employer had made a decision to discharge the employee for a lawful reason, but the decision had not yet been effectuated. The employer then offered to continue the employment, provided that an unlawful condition was met. The employee did not meet the condition and was therefore terminated. But for the unlawful condition, there would have been no termination. Thus, an expunction remedy was appropriate. By contrast, in the instant case, the termination was lawful. The unfair labor practice was the subsequent refusal to reinstate unless an unlawful condition was met. Since the termination was lawful, an expunction remedy is not appropriate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cirker's Moving & Storage Co., Inc., New York, New York, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(c) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT condition your employment on your relinquishing your right to act as union steward.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John B. Murray immediate and full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent position, without prejudice to his seniority or other rights, privileges, or working conditions, and WE WILL make him whole for any loss of pay or other benefits he may have suffered as a result of our discrimination against him, less any interim earnings, plus interest.

WE WILL notify Local 814, affiliated with International Brotherhood of Teamsters, AFL–CIO in writing, with a copy to John B. Murray, that we have no

objection to Murray resuming his position as the Union's steward.

CIRKER'S MOVING & STORAGE CO., INC.

Suzanne K. Sullivan, Esq., for the General Counsel.
Stuart H. Bompey, Esq. and *Theresa C. Mannion, Esq. (Orrick, Herrington & Sutcliffe)*, of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on October 8, 1992, at New York, New York. The complaint alleges that Cirker's Moving & Storage Co., Inc. (Cirker's or Respondent) conditioned the reinstatement of employee John B. Murray, the Charging Party (Murray), who had previously been discharged, upon his resignation from his position as shop steward for Local 814, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union), in violation of Section 8(a)(1) and (3) of the Act. In its answer, Respondent claimed that the Union, not Respondent, proposed Murray's conditional reinstatement, and asserted as affirmative defenses that the complaint is barred by an adverse final and binding arbitration and that its refusal to reinstate Murray was reasonable, in good faith, or for just cause.

All parties were provided full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Posthearing briefs were received from both the General Counsel and Respondent and have been carefully considered. On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

A. *Jurisdiction and Labor Organization Status*

Respondent, a New York corporation, with an office and place of business in New York, New York, at all material times has been engaged in the interstate and intrastate transportation of freight, including used household and office goods. At all material times, Respondent has been an employer-member of the Movers and Warehousemen's Association of Greater New York, Inc. (the Association), made up of various employers in the freight transportation industry, one purpose of which is to represent its employer-members in collective bargaining with various labor organizations, and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with various labor organizations, including Local 814, International Brotherhood of Teamsters (the Union).

Annually, Respondent, individually, and the Association's various employer-members, collectively, perform services valued in excess of $50,000, for enterprises within the State of New York, which enterprises meet a Board direct test for jurisdiction, exclusive of indirect inflow or indirect outflow. On the basis of the foregoing, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find, and Respondent also admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

B. *The Unfair Labor Practice Alleged*

1. The collective-bargaining relationship

For at least 50 years Cirker has had a collective-bargaining relationship with the Union covering its employees engaged in moving and storage work. Through its membership in and authorization of the Association, Cirker has been an employer party to a series of the Association collective-bargaining agreements with the Union, including one effective from April 1, 1989, until March 31, 1992. Article 10(V)(5) permits immediate discharge of an employee, inter alia, for ''drinking alcoholic beverages during duty hours.'' Such a discharge, is made subject to the agreement's grievance machinery under section 10(V)(6). A joint labor management board, consisting of six representatives appointed by the Association president and three members appointed by the Union with each side casting one vote, shall have the power and the duty to receive and investigate complaints of employers and violations by employers of provisions of the agreement relating, inter alia, to wages, hours, and conditions of work, and to provide hearings thereon. All disputes, grievances, and controversies of any nature between the parties which cannot be adjusted by the parties' representatives, shall be submitted to the joint board and if deadlocked, by a tie vote, the American Arbitration Association shall be the exclusive form for the determination of such matters (arts. 34 & 36A & B).

Under another article, the Employer recognizes the right of the Union to appoint and remove shop stewards. The Union shall appoint a shop steward from the Employer's seniority list. The shop steward's authority shall not exceed: 1. The investigation and presentation of grievances; 2. The transmission of routine messages and information from the local union (art. 17A & B). In a further paragraph the Employer's authority is recognized to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slowdown, or work stoppage in violation of the agreement (art. 17D).

While witnesses for both the Employer and Union testified that the relationship was generally amicable over the years, certain occurrences during the incumbancy of Murray as shop steward presented an issue as to whether animus had developed on the part of Respondent toward Murray's legitimate conduct as steward. This will be presented and discussed, infra.

2. Murray's service as steward, the events relating to his termination, and his invocation of the grievance/arbitration procedures

Murray was employed by Cirker for approximately 4 years as a driver until his termination on September 6, 1990. At the time of his termination, Murray was shop steward for the warehouse, chauffeurs (drivers), packers, and helpers employed in the bargaining unit under the agreement. Although, as noted, the Union could appoint its shop steward to serve at Cirker's, it was the Union's practice, in order to encourage democracy among its membership, to have the men elect their steward. Murray ran for the position and was elected

steward by his own men and served for 2 years until his discharge.

According to Paul Panepinto, vice president of the Union, Murray was a good shop steward. In his capacity as vice president, Panepinto negotiates contracts, becomes involved in any labor disputes which arise with contracting employers, and attempts to settle them and any grievances which are pursued. He had periodic contact with Murray on regular monthly visits to Respondent's facility, or more frequently if problems arose calling for his presence or involvement.

Panepinto testified to a number of instances when Respondent showed distress and resentment with Murray's exercise of his steward duties. Bart Cirker is Respondent's vice president in charge of operations and its principal officer in dealing with the Union on a daily basis. His uncle, Stanley Cirker, is Respondent's secretary-treasurer, acting president, and in charge of financial matters, and was the founding principal and for many years, until recently, in charge of its daily operations. On at least three or four occasions, Burt or Stanley Cirker called him to say Murray was like overdoing his job, explaining, in effect, that he was doing too good a job as shop steward.

On one occasion Murray had complained to Respondent that he wanted to check to make sure that a gasoline tank buried at the facility which had previously supplied gasoline to an old fuel pump now crated up but still located there was not still full of gasoline and creating an environmental and safety hazard. In conversation with Panepinto the Cirkers took offense to Murray's raising of this concern, and said ''Come on, this guy's not letting us breathe here.'' Panepinto responded he's doing his job.

Another time, Murray had complained on safety grounds when the Cirkers sought to have four men placed in the cab of the truck on moving and storage assignments, when the cab had normally held only three employees. Murray contended such a practice was unsafe, as a driver he was unable to shift gears, and it was hard for him to steer the truck. Murray had refused to drive with the fourth man in the cab. As a result, Respondent had been obliged to revert to the standard of three men in the cab and to utilize a second truck on jobs calling for a fourth workman.

Panepinto later independently recalled another complaint Murray had made to Respondent about its failure to reimburse the men for the fees charged them for cashing their paychecks. The Cirkers had called him to complain about Murray's conduct, saying since when do we have to pay people to cash their paycheck. Panepinto told them that's the law, and he supplied Murray with documentation from the Department of Labor to pass along to Bart Cirker which set forth the legal requirement to pay the men. There was no formal grievance filed, but Cirker was made to see the error of his ways, and Respondent started to reimburse the workers when they cashed their paychecks during the workday. Panepinto explained that it was the Union's practice to seek in the first instance to resolve disputes which arose on the job, verbally, because grievances filed in writing were required to be submitted to the joint board for determination if not adjusted, thus bringing into play a more formal, enlarged dispute hearing mechanism.

Panepinto related that he first learned about Murray's discharge early in the evening of the day it took place, on September 6, 1990. On that date, Respondent had terminated three employees, driver and steward Murray, Donald ''Whitey'' Butler, a regular helper, and George Lunney, an extra helper working that day on referral from the Union in accordance with a contract provision providing for union referral of applicants not on, or after exhaustion of, the employer's seniority list (art. 10(P)(1)). The next morning he went to the Cirker warehouse at about 7 a.m. and spoke with Bart Cirker. Bart said Murray had been terminated because he was drinking during working hours. Panepinto said that according to his conversation with Murray, he, Murray, had been on a dinner break, and there's nothing wrong with stopping for a sandwich in a bar. Cirker maintained he had caught Murray drinking when he went into the bar. After this conversation, Panepinto filed for a joint labor-management (joint board) meeting.

About 2 weeks later, and before the convening of the joint board, Panepinto testified he telephoned Stanley Cirker and told him there was a good chance he was going to lose, and why didn't he just put the guy back to work and that would be the end of it. Cirker replied he would get back to Panepinto. About a day or two later, Stanley Cirker called back Panepinto and said, ''Listen, tell Johnny Murray I'll give him his job back if he would resign as shop steward.'' Panepinto said he would talk to Murray and get back to Cirker.

Panepinto then contacted Murray and Donald Butler, told them what Stanley Cirker had said, and asked for their position. Both employees rejected Respondent's offer.

The joint board hearing then took place within a few days or a week thereafter, on September 19, 1990. As to Lunney, the joint board concluded there was insufficient evidence to terminate him and he was thereafter placed back on the union list. As to Murray and Butler, the joint board deadlocked, and the Union filed for arbitration on their behalf.

About a week after the joint board hearing, Panepinto again called Stanley Cirker and told him, because of the deadlock there's a good chance of arbitration, ''You're going to lose and that will involve all this backpay, overtime.'' Panepinto added ''your [sic] talking about big numbers here.'' Panepinto then asked, ''Why don't you sweeten the pie a little but [sic]?'' Stanley Cirker said he'd get back to Panepinto. A day or so later he telephoned Panepinto and said, ''Listen, I'll throw in three weeks backpay, I'll give him his job but he would have to give up his position as shop steward.''

Panepinto again went to see Murray and Butler and they both again said no to this offer.

Subsequent to the joint board hearing, and before the arbitration hearing was held on January 14, 1991, Murray filed a charge with Region 2 of the Board in Case 2–CA–24720 on October 24, 1990, alleging that he was impermissibly terminated by Respondent because of his union activities and because of his union stewardship. On or about December 10, 1990, the Region deferred this charge to the pending arbitration proceeding.

Before the arbitration hearing went ahead on January 14, 1991, the various participants had arrived and were waiting in the room or an adjoining hallway. As Panepinto was standing just inside the doorway of the hearing room talking with employee Butler, he saw Peter Furtado, union secretary-treasurer, talking with Stanley Cirker 7 feet away but did not hear them. Furtado next went over to Panepinto, and said

that Stanley told him the offer still stands but this time he'd jack it up a week to 4 weeks' pay. Panepinto understood this offer was made to both Butler and Murray. Butler then said he'd accept it and go back to work. Panepinto and Furtado then called Murray over, and Panepinto told him, ''Listen, Stanley upped the offer to 4 weeks' backpay, he'll reinstate you but you have to give up your shop steward's position.'' Murray said no, he wanted to go through with the arbitration hearing. Panepinto emphatically denied that he or any other union representative first proposed that Murray step down as shop steward.

Since Butler's case had been resolved, the arbitration hearing went forward on Murray's grievance and concluded that day. The parties were each represented by counsel, the Union by Bruce Levine and Respondent by Stuart Pompey, its counsel in the instant proceeding. Among the witnesses who testified were Bart Cirker and John Murray. Arbitrator Richard Adelman issued an opinion and award on January 30, 1991. The arbitrator found that on the day of the discharges, September 6, 1990, Murray had been assigned to drive a truck, and assisted by Butler and Lunney, to deliver voting machines from a warehouse to various polling sites for a New York City primary election. After making an initial delivery they ate lunch to about 3:30 p.m. and then loaded voting machines for a second run. Upon receiving instructions from dispatcher John Avrutis by telephone to proceed on the run into overtime, the three-man crew departed the warehouse, made various deliveries in the area of 90th Street and Second Avenue in the Borough of Manhattan, and before making the last one assigned, parked the truck and at about 7:05 p.m. entered a bar on 92nd Street and Second Avenue. Bart Cirker and James Pantazis, a dispatcher, who had been engaging in surveillance of the crew because of a belief by Cirker that he had detected the odor of alcohol on the breath of several employees, observed the men enter and went in themselves. They observed each man seated at the bar with a bottle of beer in front of him and drinking from a glass. Cirker and Pantazis testified that Murray acknowledged he had been ''gotten'' and handed over the keys of the truck to Pantazis. Cirker told them they were fired. After Cirker and Pantazis left the bar and reached the truck, Murray came after them and said ''We were on supper break, that's what I'm going to tell Pauly.''

Arbitrator Adelman noted that Murray testified he had informed the dispatcher on duty that they were going to take a supper break, that they had visited the bar to have sandwiches and were about to order them, and he did not have a beer or drink any in the bar.

Cirker argued that Murray was ''drinking alcoholic beverages during duty hours'' in violation of section 10(V)(5), and had no authorization for, and was not on, a supper break. The Union suggested that Murray was discharged because he was the shop steward, did not get along with certain management personnel, including Stanley Cirker and the dispatcher Avrutis.

Arbitrator Adelman sustained the discharge, finding that Murray, who had no authorization to take a supper break, was drinking an alcoholic beverage at 7:05 p.m. while still on duty in violation of the agreement, and thus warranting his immediate discharge. The arbitrator also discounted the Union's claim that Murray was discharged because he was shop steward, noting Murray's own testimony that he did not have any particular problems with Bart Cirker and that he thought the Company was generally fair.

The parties stipulated that the alleged settlement offer with regard to Murray, described earlier, was not raised at the arbitration hearing by any party. In fact, no settlement offers were raised at the arbitration hearing.

On or about June 14, 1991, Murray filed the instant charge alleging that Respondent, immediately prior to the arbitration hearing, impermissibly conditioned his reinstatement on abdicating his shop stewardship.

Earlier, on May 4, 1991, the Regional Director dismissed Murray's earlier charge, which he had deferred pending the arbitration. Murray's appeal of this dismissal was denied by the General Counsel's Office of Appeals in Washington, D.C., by letter dated June 12, 1992.

On cross-examination, Panepinto clarified that in his first conversation with Stanley Cirker he had sought reinstatement of both Butler and Murray, and that Cirker's offer to reinstate was made with respect to both employees but did include a requirement that Murray gave up his steward position. When Butler rejected the offer he said he was going to stay with the shop steward.

As to Murray, he denied any wrongdoing, wanted to be reinstated the right way, and refused to give up or lose something (his stewardship) when he wasn't wrong.

Again, in his second approach to Stanley Cirker after the joint board hearing, Panepinto noted he was again urging reinstatement for both employees. As to Cirker's conditioning Murray's return on his loss of his steward's position, Panepinto was asked and denied that he told Cirker it was okay with him. Panepinto replied, in a firm, perhaps even an indignant tone, ''what do you mean, okay with me?,'' then noting, in response to other questions as to whether it was unacceptable to the Union, or whether the Union had no problem with it, ''No, it's not my place to say what's not acceptable'' and ''of course not. Johnny Murray wants to give up his shop steward's job that's his business. He can give it up at any time he wants without even being fired.'' (Tr. 51.) Panepinto and the Union's position were made abundantly clear, even if not stated in so many words, that they were not about to take Murray's union position away from him, were not about to agree with Cirker to such a result, and that only Murray, himself, could make that decision, in any case, and, in particular in this case, where his reinstatement to his job before arbitration hinged on his response.

After receiving Stanley Cirker's last response after the joint board hearing, increasing the backpay offer, Panepinto was asked on cross-examination as to Butler's and Murray's responses when he contacted them, and replied that Butler said he would do whatever the shop steward did and Murray said he would go to arbitration with it. Panepinto did not ask him why.

During his cross-examination Panepinto acknowledged that in his prehearing affidavit he had indicated that before arbitration proceeded he saw Furtado meeting with Stanley and Bart Cirker. When asked if this was correct, Panepinto replied that if that's what he wrote down he guessed he must have said it. While the affidavit conflicts with Panepinto's trial testimony that he saw Furtado conversing only with Stanley Cirker before Furtado came over to where he was standing in the doorway with Butler, I find that Panepinto

was not comfortable with the affidavit version and his response above shows as much. I credit Panepinto's trial version, indeed, he shortly reaffirmed it when he recalled Furtado came over and repeated the proposal that Stanley Cirker had made to him, and I do not take this inconsistency as a major internal conflict sufficient to impeach Panepinto's testimony as to his involvement in the series of events including his earlier conversations with Stanley Cirker, and Furtado's recounting of his own conversation with Stanley Cirker on the eve of the arbitration.

Panepinto repeated his recollection of the proposal for the two employees which Stanley Cirker had submitted to them through Furtado. He didn't recall any agreement incorporating Butler's acceptance of the offer, certainly not one he signed that day. However, when Respondent's counsel then showed him a settlement agreement providing for Butler's withdrawal with prejudice of his discharge grievance and his immediate reinstatement but with a disciplinary warning notice in view of his 20 years of service, good performance, and the adverse effect of a termination on his ability to collect full pension benefits, Panepinto acknowledged his signature and that he had forgotten about the agreement which he believed was executed sometime after the arbitration. In paragraph 4 of the agreement Butler is listed as receiving 3 weeks of backpay, contrary to Panepinto's testimonial recollection of the arbitration eve offer of 4 weeks. Again, Panepinto's failure to recall his signing an agreement memorializing the parties' resolution of Butler's grievance does not serve to discredit his testimony and neither does the relatively minor discrepancy between the January 14, 1991 backpay offer to which he testified and the one to which the parties' agreed. It may also have been the fact that the offer to Murray was 4 weeks' pay and to Butler was 3 weeks so that no inconsistency as to the amount for Murray is evident. See Furtado's recital of events, infra.

Respondent finally sought to show that Panepinto, contrary to his testimony, had placed Murray and Butler together when Furtado came over and relayed Cirker's final settlement offer. Panepinto maintained, consistent with his direct testimony that Furtado spoke to Butler and himself at the time and Murray was then called over. The discrepancy, if any exists at all, is minor and fails to discredit the main thrust and significant aspects of Panepinto's recital. Panepinto's failure to recount the amount of the backpay offer in his affidavit, other than describing it as ''some backpay'' is hardly an inconsistency and certainly not worthy of Respondent counsel's efforts to portray it as such.

Finally, Panepinto was unable to explain Butler's arbitration eve acceptance of an offer he had previously rejected in solidarity with his fellow employee, Steward Murray. Butler did not explain his acceptance, but it is evident from the agreement entered on his behalf, and later testimony by Respondent witnesses, that Butler's reinstatement was made to enable him to secure a full pension, something which an employee would naturally be loathe to forfeit if the opportunity to secure it was then made available to him. This last opportunity appears to have overridden his concern with Murray's forced loss of his steward position.

Peter Furtado's testimony corroborated Panepinto's basic presentation. Furtado recalled that while waiting for the arbitration hearing to get underway, after talking with his company counterpart, Union Counsel Bruce Levine suggested he get together with the owner of the Company, Stanley Cirker, to discuss the case and see if they could work something out. At that point Furtado went over to Stanley Cirker in the hall away from the others, and Stanley Cirker told him that he would take Whitey Butler back in his employ with backpay, he believed it was 3 weeks, and he would also take John Murray back with 4 weeks' backpay, under the stipulation that he would resign as shop steward. Furtado told Cirker he would propose that to John Murray and Whitey Butler and see what they said.

Furtado next went over to Murray, Butler, and Panepinto and told them, look, Stanley Cirker just made this offer. Whitey, he'll take you back with about 3 weeks' backpay. And he told John Murray that Cirker would take him back as well and he would give him 4 weeks' backpay provided he would resign as shop steward. Butler told him he would accept the offer and Murray said he would take his chances in arbitration. They then proceeded into the hearing room. Furtado told union counsel of the result of his talk with Stanley Cirker.

On cross-examination, Furtado denied he had made any proposal to the men. Stanley Cirker gave him those proposals. He just passed them from one person to another. Yet, like Panepinto, he also felt that anything that is reasonable to get a man his job back he'll propose. Had Murray accepted the proposal made, it would have been perfectly okay with him and the Union. Yet he offered no opinion or advice to Murray when he passed along Stanley Cirker's offer.

Furtado's testimony is strengthened, not weakened, by Respondent counsel's producing and including in the record a contemporaneous set of notes, which Furtado's took of the significant events of the day of the arbitration. In his notes, Panepinto wrote,

> Prior to Hearing: an agreement was reached, to sever Whitey and reinstate him to his position with three (3) weeks backpay. Whitey accepted. Union and Company asked Murray if it would be acceptable to him to get:
>
> 1) job reinstated
> 2) one (1) month backpay
> 3) removal of shop stewardship—forever.
>
> This was not acceptable to Murray therefore arbitration proceeded.

In interpreting ''union and company asked Murray,'' Respondent is urging the court to conclude that the offer to Murray was joint, originating with both parties. It is evident from both Furtado's direct testimony, his later testimony under cross-examination and later redirect examination, that he was relaying to Murray a proposal made by Cirker but which neither he nor the Union would have rejected had Murray accepted it. Indeed, these notes independently serve to establish in my judgment that Respondent not only engaged in arbitration eve negotiations with the Union regarding both men but that Respondent proposed that Murray forfeit his elective office of steward, contrary to Stanley Cirker's own testimony, in which he later denied making any such proposal.

I am convinced that Furtado's carefully prepared contemporaneous summary of the salient events of that day, both before and during the presentation of testimony, represents accurately the positions taken by the parties both prior to and

during the arbitration. Of course, it is Furtado's written recital of the offer to Murray which is most significant in this case and which must be analyzed closely in determining Respondent's legal responsibilities toward him.

On further cross-examination, Furtado was careful to note that Bart Cirker was not privy to his conversation with Stanley Cirker but was also standing some distance away in the hallway. The only Respondent representative present and to whom he was directed and referred by union counsel was Stanley Cirker.

In its defense Respondent called to the witness stand both Bart and Stanley Cirker.

Bart Cirker denied that the Company's relationship with John Murray when he was shop steward was any different, either worse or better, than with other union shop stewards who preceded or succeeded him. Significantly, however, neither Bart Cirker nor Stanley Cirker, when he later took the witness stand, were asked about nor denied that either of them had expressed resentment about Murray's pressing of complaints as described and reported by Union Vice President Panepinto.

Bart Cirker noted that Murray's case was the first time Respondent had given to arbitration with the Union. Over the last 10 years, about 10 disputes had been submitted to the joint board.

Bart Cirker testified that a short time after the joint board hearing his uncle, Stanley Cirker, told him that he had a conversation with Paul Panepinto regarding reinstatement of both Butler and Murray. Stanley said Panepinto asked with regard to Murray if we would consider taking him back with the possibility of not being shop steward. Bart could not recall if backpay was discussed between the two. Stanley said he told Panepinto that he couldn't answer at that moment. He had to speak to others, namely Bart and other people in the organization. Stanley Cirker told Bart that he also asked Panepinto if Murray was aware of this offer, was it an offer coming from Murray or just from the Union. Bart Cirker's understanding was that Panepinto was going to check with Murray and get back to Stanley with that. Bart Cirker continued that it later came back to Stanley from Panepinto that Murray was not interested in such an offer and we then proceeded on to arbitration.

In this discussion with his uncle, Bart Cirker said he couldn't take Murray back under any circumstances. He had caught him drinking, he's a driver, and he would not take him back.

On the day of the arbitration Bart Cirker did not meet with Furtado or Panepinto prior to the actual hearing. But Stanley came over to him and said that Furtado had approached him and asked if Cirker would consider taking back Butler as he had only several weeks to go to obtain a pension and had been with the Company in excess of 20 years. Based on his lengthy period of good service and Stanley's opinion, Bart was willing to go along to permit Butler to work long enough to earn his pension and then retire.

Bart further testified that prior to the actual arbitration hearing, Stanley told him that the Union had reiterated their question as to whether the Company would be interested in taking Murray back under the same terms and conditions without being shop steward again. Bart did not recall whether backpay was an issue at this point. Stanley told Bart he he had told the Union no at that point. Bart's own view was that the Company's position was going to be strong enough at the arbitration to win the case outright, so that there was no reason to compromise. Furthermore, in the interest of public safety, although not under the contract, it made a difference to Bart Cirker whether the individual caught drinking was a driver rather than a helper.

During his cross-examination, for the first time, and contrary to his earlier denial that he had spoken to the Union prior to the joint board hearing, Bart Cirker noted that he probably spoke to the Union the morning after the discharges when Panepinto came down to the facility to discuss the matters with him.

As to Bart Cirker's finding the Company's relationship with Murray no better and no worse than under prior shop stewards, he now acknowledged that Cirker may have been investigated by the Department of Labor, although he was not aware when John Murray was shop steward but not to his knowledge under prior stewards. Murray's objecting to the practice of putting four men in the front seat of a cab also meant that the Company was now going to have to pay for an extra van for the fourth man, contrary to its practice before and during part of the time Murray was shop steward. Furthermore, since Murray became steward Cirker was now paying for check-cashing privileges for its employees. Bart Cirker explained that under the prior steward, the bank which employees used to cash their checks was on the street corner of the facility which employees could visit at their convenience. After that bank closed and employees had to go several blocks and spend more time to cash their checks, ''it was brought to [his] attention'' and Cirker made arrangements to pay a check-cashing establishment nearby to perform this service for its employees. It is evident that it was Murray, supported by Panepinto, who brought the issue to Cirker's attention. And Bart Cirker shortly confirmed that this was so. (Tr. 104.)

Bart Cirker was also not aware of any shop steward other than Murray, prior to Murray, who raised safety violations under the contract.

Bart Cirker disclosed on redirect examination that when Murray's predecessor as shop steward, a Mr. Ahearn, first began as steward in 1985 or 1986 he presented approximately 40 outstanding complaints to him in an effort to clear up a lot of problems with the men which had not been dealt with, and at a meeting with Ahearn and the dispatcher a great many were resolved, some of which cost the company money. When questioned closely by the General Counsel on re-cross-examination as to which of the beefs cost Cirker money and how much was the cost, Bart could not recall the particular complaints, not even the nature of them, and didn't know how much their settlement cost. Bart Cirker did subsequently mention that some of them involved a failure to follow the seniority provisions of the contract on hiring, each of which cost the Company $150 a day. But he also agreed that Murray had also processed similar violations while he was steward. Following the resolution of the accumulated complaints with Ahearn, he did not process many more involving the seniority provision.

Stanley Cirker claimed to have met John Murray once or twice to exchange pleasantries and to have had a good relationship with him. His relations with the Union over the last 10 years were also good.

Sometime in September 1990 Stanley received a phone call from Bart informing him that he had terminated Murray, Butler, and a man named Louie after having caught them drinking in a bar. Stanley next learned that a grievance involving them was going into joint labor-management. He denied having any conversation with Union Agent Paul Panepinto prior to the joint board meeting.

After it was decided to put the case into arbitration, Stanley Cirker received a message at his office to call Panepinto. He returned the call. After some pleasantries, Panepinto said going to arbitration will be costly what with legal fees and other costs. The arbitrator could favor the employee and cost you a lot of backpay and maybe you ought to think about straightening out this thing. He then asked would you consider taking Murray back, not as shop steward, but as a driver for the Company. Stanley replied he'd have to think about it. Cirker then asked have you spoken to Murray about this and what's his attitude. Panepinto said he'd speak to Murray and get back to Stanley. Stanley Cirker later affirmed that when he ended this conversation, it was his understanding that Panepinto had not yet talked with Murray as to whether Murray would accept coming back as a chauffeur without being steward. One or two days later, Panepinto called back to say that Murray would not come back except as shop steward. Stanley Cirker told Panepinto that they would go to arbitration.

Stanley Cirker repeated these conversations to Bart Cirker. Bart told him he didn't want to take Murray back, neither as a chauffeur nor shop steward.

On the day of the arbitration, Stanley Cirker swore that he had a discussion with Peter Panepinto in the corridor outside the hearing room. There were just the two of them. Panepinto asked if Stanley would consider taking John Murray back, forgetting about the shop steward situation and he'd come back as a helper. Stanley answered no, he was not going to reverse his opinions, and they would go to arbitration. Next Panepinto mentioned that Whitey Butler had about 9 weeks to go in order to get his pension, and would the Company consider taking him back. You'd have to give him a couple of weeks of backpay and that will be the end of the situation. Butler agreed to that.

Stanley Cirker accepted the agreement and understanding that Butler would retire after Cirker would make up the time he needed in order to qualify for his pension.

Before agreeing, Stanley Cirker relayed this offer to his nephew Bart Cirker who disagreed and wanted both cases to go into arbitration. Stanley noted that since he was the senior officer of the Company he accepted the Butler offer but not the one involving Murray.

Stanley Cirker denied at any time making any offer to the Union to reinstate Murray under any conditions, certainly not an offer to reinstate him as long as he wasn't the shop steward. In Stanley's view, he had to go by the rules of the union contract. Since Butler had worked for the Company for 20 years, he knew him well, and the Union had asked for help in getting him his pension, he went along with it.

Interestingly, in contrast to Bart Cirker's position, it made no difference to Stanley in weighing their drinking infractions that Butler was a helper and Murray was a driver.

During his cross-examination by counsel for the General Counsel, Stanley Cirker now testified that Panepinto never came to him prior to the arbitration, but that Furtado did. Cirker did not explain this significant change in the identity of the union agent with whom he resolved one of the two pending arbitration cases.

Although Stanley Cirker had told Panepinto he would think about taking Murray back as chauffeur but not as steward, and had even asked Panepinto if Murray was aware of and had approved this offer, he later explained that he never considered reinstating Murray under such a condition but never told Panepinto his true feelings. Stanley Cirker's explanation for this provocative conduct is not convincing.

When asked if it wasn't true that it was a daily practice, a regular practice, for employees to have a beer with lunch, Stanley responded that he didn't know. He also noted that the Company ''couldn't'' object when employees took a beer with their lunch.

I have previously noted that Panepinto and Furtado made credible, consistent presentations of the salient facts, in particular Panepinto with regard to his interchanges with Stanley Cirker prior to the arbitration, and Furtado as to his discussion with Stanley Cirker the morning of the arbitration and his relay of the results of that conversation immediately thereafter to Panepinto and the two employees, Butler and Murray.

Both Bart Cirker's and Stanley Cirker's presentations contain such inconsistencies and are so improbable in light of other evidence in the record in regard to Stanley Cirker's interchanges with Panepinto and Furtado as to lead me to discredit their defense that Cirker did not make an offer of reemployment to Murray conditioned on his relinquishing his position as shop steward.

Bart Cirker was less than candid and straight forward in initially denying that John Murray's tenure as shop steward created more problems for Respondent than that of his predecessors. By his and Stanley Cirker's failures to deny their expressions of resentment made in response to Murray's pressing of informal complaints to Respondent's conduct or practices, attributed to them by Panepinto, as well as Bart Cirker's later reluctant acknowledgement, inconsistent with his initial denial, of the extra costs to the Company arising from Murray's raising objections to Cirker's truck manning and wage payment practices, I conclude that Murray's performance of his duties as steward was a matter of some concern to Respondent and I do not credit Bart Cirker's earlier testimony that Respondent's relationship with Murray was no different from its relations with prior or later stewards. Bart Cirker's testimony was also vague when it came to whether and to what extent backpay offers were made in the settlement talks, in particular, with respect to Murray.

In his testimony reporting his conversations with his uncle after Panepinto telephoned Stanley and Furtado approached Stanley in the hallway the morning of the arbitration, Bart Cirker was generally consistent with Stanley's recital except for his failure to recall backpay as a topic and the outlandish claim made by Stanley that the Union offered to have Murray reemployed as a helper. Such general consistency is not surprising and relates for more to a conscious attempt by the two related Respondent principals to avoid liability in this case than to an independent corroboration of plausible testimony. Bart Cirker also agreed with Furtado and with Panepinto's credited trial testimony that his uncle had a private discussion with Furtado prior to the start of the arbitration.

Ultimately, it is Stanley Cirker's recital of his interchanges with the Union, which Bart Cirker claimed were reported to him, which must be examined for their trustworthiness.

I do not credit Stanley Cirker that Panepinto first contacted him after the joint board hearing. It was consistent with the Union's efforts to resolve disputes informally, insofar as possible, that Panepinto would have sought to settle the two regular employee grievances before they were formally presented to the joint board. Apart from the timing of their initial contact, I find it inconceivable, given Panepinto's strong feelings about employee determination and autonomy in arriving at settlement terms, generally, of employee disciplinary grievances and his consistent and firm expression of the Union's view that only Murray, himself, could abandon his shop steward position, that Panepinto would suggest at all on their first contact, as testified by Stanley Cirker, that Murray would renounce his union role in return for reinstatement as driver. Neither is it conceivable in any event, that Panepinto would have done so without first procuring Murray's agreement to such action as Stanley Cirker also testified.

Stanley Cirker changed the identity of the union agent who approached him with an offer as to both employees on the eve of the arbitration, between his direct and cross-examination. Furthermore, he now added a union proposal which is unbelievable, that Murray, a driver for the 4 years of his employment, aside from his status and stature as steward, would accept a position as helper. As noted, even Bart Cirker did not report that he received this portion of the Union's last minute offer from his uncle and I find that it was never made.

Stanley Cirker was acting president and chief financial officer and continued to be sufficiently involved in the business operations to be aware of Murray's functioning as steward, particularly insofar as his complaints resulted in additional costs of operation. Stanley Cirker never denied he was aware of Murray as steward or that his nephew, Bart, would not have consulted him about the pending grievances and possible resolutions short of arbitration. Indeed, Bart promptly consulted Stanley the evening of the discharge. I further find that Stanley Cirker was aware of Bart Cirker's expression of animus toward Murray's exercise of his shop steward duties and that Bart Cirker's hostility underlay his own settlement offer regarding Murray.

It is significant that Stanley Cirker made the decision to settle Butler's case after prior consultation with Bart and against Bart's consistent position that both Butler and Murray's terminations should stand (although Bart considered Butler less responsible as helper). As senior company officer he admittedly made the final decision to accept the Union's offer, modifying his prior firm stance against waiving contract breaches. I find that as senior company official he also made the offer to the Union which was relayed to Murray that Murray could have his job back if he gave up his position as shop steward. The deadlock at the joint board did not provide any advance indication as to how the arbitration might play out, and while Bart Cirker believed the case against Murray was strong, Stanley Cirker had limited, but good relations with Murray, had final independent authority to resolve Murray's grievance, and had always maintained good relations with the Union over 50 years of business activity.

Stanley Cirker's good sense in working out Whitey Butler's grievance probably led him to believe that Murray's case could be settled as well at the same time so long as he could be gotten ''off the company's back.'' Stanley Cirker never testified that his conversations with either Panepinto or Furtado were on advise of counsel, neither his earlier telephone contacts with Panepinto nor his arbitration eve discussion with Furtado. The Butler memorandum was not prepared that day but was drawn up probably by counsel after the principals had agreed. Likewise there was no reason to consult counsel because Respondent's conditional offer had been consistently rejected by Murray, the last time the morning of his arbitration.

I also find that Murray, in rejecting the Respondent's conditional offer, never stated or implied that he was doing so solely to seek reinstatement with full backpay. Recall that Panepinto reported that Murray's initial reaction to Stanley's telephone offer included a statement of his refusal to lose something, an obvious reference to his stewardship. The backpay first offered him was a fair or reasonable amount given the fact that only weeks had elapsed since his discharge, and his future tenure as driver was being assured. What was consistently missing from Respondent's offer was the restoration of his union position. The reinstatement with some backpay was vindication for Murray and the Union's belief that his job had been improperly or unfairly removed. Until his union status was restored Murray's grievance was not being appropriately remedied. That Respondent's principals may have erroneously believed that as steward Murray owed a greater duty to comply with contractual requirement than other employees,[1] did not excuse them from seeking to punish Murray in his capacity as union agent, thereby causing the Union to lose stature in the eyes of unit employees.

Analysis

As I have found, above, the Respondent offered to reinstate Murray to his former job as driver, provided he resign his union position as shop steward. Murray's right to hold union office is protected under Section 7 of the Act. An employer is not free to refuse employment because the applicant has been designated as shop steward. *Aces Mechanical Corp*., 282 NLRB 928, 930 (1987). Similarly, conditioning reinstatement to an employee's former position from which he had been discharged upon his agreement that he not serve as chairman or committeeman of the Union for the duration of the next two collective-bargaining contracts has been found by the Board to violate Section 8(a)(1) and (3) of the Act. *Sycon Corp*., 258 NLRB 1159 (1981). Such conduct places an employee in the position of having to make a coerced choice between foregoing his employment or foregoing his Section 7 rights. *Dravo Corp*., 228 NLRB 872, 874 fn. 7 (1977). The natural and foreseeable consequence of such conduct is to discourage active membership in the Union by its employees and, particularly, to discourage employees from serving as stewards on behalf of the Union. Id. at 874. Since the designation of a union steward and the proper per-

[1] The collective-bargaining agreement contains no language or provision placing a greater responsibility, duty, or burden on the shop steward to comply with its terms, except for the steward being subject to discipline for an unauthorized strike action, slowdown, or work stoppage, none of which took place or are present in this case.

formance of a steward's duties are protected under the Act as a legitimate union activity, discrimination based on designation as a steward, or, as in this case, conditioning reinstatement on the relinquishment of that designation, violates Section 8(a)(1) and (3), and union animus is inherent in such discrimination. See *Commercial Contracting Co*., 283 NLRB 784 (1987); see also *John P. Bell & Sons, Inc*., 266 NLRB 607 (1983). An employer's restrictions on employees' and union's rights to be represented by persons of their choice cannot be diluted in the absence of compelling evidence of legitimate considerations. *Dravo Corp*., supra.

Respondent argues in its brief that Murray's conduct of drinking during working hours, as confirmed by the arbitrator, was such a flagrant violation of the collective-bargaining agreement that Respondent was justified in conditioning Murray's job restoration on his agreement not to serve as steward. It should first be noted that Stanley Cirker, who made no distinction between driver and helper, was amenable to the reinstatement of the helper who had participated in the incident at the bar. While justifying Butler's special treatment on humanitarian grounds, Respondent has certainly weakened its position that those who participated in this flagrant contractual violation can only be deemed to have forfeited or, at least restricted their legitimate participation in Cirker's affairs.

Aside from its inconsistent treatment of the wrongdoers, Respondent's argument is not well founded. And its reliance on *Bethenergy Mines*, 308 NLRB 1242 (1992), is misplaced. In *Bethenergy* a group of employees had engaged in an unprotected, unauthorized work stoppage at the employer's premises and extended this misconduct by picketing an unrelated employer. The Board held that by engaging in such conduct in contravention of the contract's mandatory procedures for the peaceful resolution of disputes over health care benefits, the employees had exhibited contempt for the collective-bargaining agreement and it was not arbitrary for the Respondent to seek to prohibit them from holding union positions that required them to deal with management for the duration of the contract.

Contrary to the situation in *Bethenergy*, there is no nexus here between Murray's breach of the contract and the prohibition from permanently serving as union steward which Respondent required from him. By permanently denying Murray his prior union position, Respondent has clearly not imposed a ''condition narrowly drawn to fit the situation and designed to be prophylactic.'' Id. at 1242. No contract provision required Murray to serve as a model for fellow employees. There is no evidence that Murray's appearance in the bar with a glass of beer in front of him on the occasion in question which led to his discharge shows he was not in full possession of his mental faculties or physical capabilities on that occasion or any other and not fully qualified to perform his duties as both driver and shop steward. Respondent failed to offer any history of conduct engaged in by Murray inimical to Respondent's legitimate interests on any occasion over his 4 years of employment.

Murray's conduct may have breached the contract provision at issue; it did not evidence either contempt for the agreement or for the process of peaceful resolution of disputes thereunder. None of the cases, including *Bethenergy*, may be relied on to assert otherwise. In the absence of any evidence that Murray in any way abused his privilege of acting as steward in presenting grievances or other matters on behalf of his fellow employees, see *Sycon Corp*., supra, 258 NLRB at 1160, I dismiss this defense as lacking any merit whatsoever.

Respondent also claimed and, indeed filed, a written motion in support at trial, that the evidence regarding its conduct toward Murray was excludable because in contravention of Federal Rule of Evidence 408. That rule provides, in sum, that evidence of offering or accepting a valuable consideration in compromising a claim disputed as to validity or amount is not admissible to prove liability for or invalidity of the claim or its amount and neither is evidence of conduct or statements made in compromise negotiations. The rule goes on to state, that, ''this rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose.''

Here, the General Counsel is not contesting Murray's discharge for his participation in the events of September 6, 1990, and a fortiori is not seeking to elicit Stanley Cirker's conditional offer to contradict that discharge. ''Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity of the claim under negotiation. To the extent that the evidence is offered for another purpose, and to the extent that either party makes an independent admission of fact, the evidence is admissible.'' *Vulcan Hart Corp. v. NLRB*, 718 F.2d 268, 277 (8th Cir. 1983), enfg. in relevant part 262 NLRB 167 (1982). Just as the court in *Vulcan Hart Corp*. recognized that the Respondent employer's statements made in the context of negotiations to settle an employee's discharge grievance, making his reinstatement conditional on his resignation from union office, was independent of his discharge claim which was not at issue before the Board, so too, in the instant proceeding, Stanley Cirker's conditional offer of reinstatement to Murray was an independent act unrelated to his discharge grievance and aimed specifically at coercing Murray to forfeit his Section 7 rights or his job, in violation of Section 8(a)(1) and (3).

Contee Sand & Gravel Co., 274 NLRB 574 (1985), relied on by Respondent, is inapposite. The Board there properly excluded evidence offered by the General Counsel that during the course of negotiations to settle the very unfair labor practice charges alleging a refusal to bargain forming the basis for that proceeding, Respondent agreed to execute new collective-bargaining agreements with the Union. As noted by the Board, the alleged new collective-bargaining agreements were so closely intertwined with the unfair labor practices then under discussion that they could not be separated therefrom. Id. at fn. 1. Thus, the General Counsel's attempted use of the settlement statements made were not offered ''for another purpose'' but for the very purpose of proving agreement, the gravamen of the charges filed and consolidated with the existing ones after the settlement meeting was held.

Clearly, consistent with the teaching of *Vulcan Hart Corp*. and *Contee Sand & Gravel Co*., the evidence of Stanley Cirker's offer is admissible to prove that an independent unfair labor practice of coercing an employee from exercising Section 7 rights encompassed by the complaint took place

during settlement discussions on Murray's discharge grievance which was not in issue in this proceeding.

Respondent raises yet another defense to the complaint, by way of affirmative defense in its answer, but not in its posthearing brief, that the complaint is barred by an adverse final and binding arbitration decision upholding Murray's discharge.

I conclude that the General Counsel has met its burden established under *Olin Corp*., 268 NLRB 573, 575 (1984), that deferral of this proceeding to the arbitrator's award would be inappropriate. Under *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), as amended in *Raytheon Co*., 140 NLRB (1963), and further clarified in *Olin Corp*., supra, the Board will defer to arbitration awards where the proceedings appear to have been fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act, and the arbitrator has considered the unfair labor practice issue. The Board in *Olin* concluded that the last standard for deferral would be met if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

It is evident that the arbitrator had before him as the sole issue whether John Murray was discharged for just cause as provided in section 10(v)(5) of the contract. The relevant evidence included whether, and to what extent, Murray engaged in job misconduct justifying his discharge. The issue involved in this proceeding is whether Respondent's imposition of the condition to his reinstatement that Murray resign his union position as shop steward violated the Act. The evidence bearing on the resolution of that issue relates to events and conversations which all took place after his discharge. Thus, the issues are not factually parallel and the arbitrator was not presented generally with the facts bearing on the unfair labor practice issue. See *Aces Mechanical Corp*., 282 NLRB 928, 930 (1987). While it appears that the Union argued or sought to present evidence to the arbitrator showing that Murray was discharged because he was shop steward, it is also evident that no evidence was submitted, and the arbitrator did not hear or consider the settlement offer immediately preceding the arbitration hearing which is the central issue in the instant proceeding, nor any of the evidence regarding Murray's presentation of grievances and Respondent's negative reaction to such conduct which relate to Respondent's motive for the condition attached to the offer. The parties stipulated that the alleged settlement offer with regard to Murray was not raised by any party, nor were any other offers raised (which would have included the one made to and accepted by Butler). A reading of the arbitrator's opinion and award confirms that neither the unfair labor practice issue nor the evidence bearing on it was considered by him.

Whether Arbitrator Adelman's award is clearly repugnant to the Act depends on whether Murray's discharge can be considered independent of the conditions Respondent placed on his achieving the return of his job which, if they had been agreed to by Murray, would probably have resulted in a settlement of his grievance just as Butler's grievance was settled on the eve of the arbitration hearing. On balance, I conclude that the award is repugnant in the light of the facts of record in this proceeding. Had Murray's discharge under the contract been permitted to resolve the instant proceeding, such a result would be repugnant to the purposes and policies of the Act of encouraging employee union participation and preventing direct employer interference with such activity by making employment hinge on its renunciation.

Accordingly, I recommend that the Board refuse to defer this proceeding to that award.

Having concluded that the General Counsel has made a prima facie showing that Murray's protected conduct was a motivating factor in conditioning his reinstatement as a driver on his relinquishing his position as union steward, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1982), the burden shifts to the Respondent to establish that it would have taken the same action in the absence of Murray's Section 7 conduct. I conclude that it is unable to do so, and that it has thereby engaged in unlawful conduct in violation of Section 8(a)(1) and (3).

In its defense, Respondent sought to show that the Union initiated the conditional offer. In determining the facts, and in resolving credibility conflicts, supra, I found that neither union agent, Panepinto nor Furtado, initiated the proposal that Murray renounce his stewardship. Even if it had, such arbitrary action by a union against an employee would not provide a defense to Respondent's participation in the transmission and agreement to the illegal offer to Murray. An employer who accedes to a union's unlawful demands independently discriminates against the affected employee and the Union's initiation of the proposal provides no defense to its own illegal acts. *Sycon Corp*., 258 NLRB 1159, 1160 fn. 2 (1981).

Neither has Respondent sustained its burden of showing that the Union waived Murray's right to be shop steward. In my detailed weighing of the union agents' testimony on the subject, I found that the Union practiced a policy of neutrality in evaluating an employer's request to relieve a member of the shop steward job. Insofar as the condition Respondent imposed on Murray's reinstatement involved his loss of a union representative position, the Union was loath to recommend his acceding to the stipulation and studiously refrained from offering any advise. It was a decision only the incumbent employee could make, having in mind both the personal benefit of job restoration and the loss of status and effective participation in union affairs and union labor-management relations which acceptance of the offer entailed. Under the test enunciated in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and recently discussed and applied in *Aces Mechanical Corp*., 282 NLRB 928, 930 (1987), which requires that a waiver of statutory rights be established clearly and unmistakably, the Union's conduct here fell far short of establishing that such a waiver occurred here. See *Bethenergy Mines*, supra, 308 NLRB 1242, 1243 (1992). Finally, there is serious question whether the Union had the power or authority to effectuate a waiver of Murray's participation in its affairs inasmuch as he was elected to the steward position by his fellow employees under a longstanding practice even though the Union's right of selection is spelled out in the contract. See *Aces Mechanical Corp*., 282 NLRB 928 at 930 (1987). As pointed out in the General Counsel's brief, such cases as *Shenango Inc*., 237 NLRB 1355 (1988), in which the Board validated a union's removal of a dissident member from an appointed union position, hardly

stands for the proposition that an employee occupying an elected union position can be removed by the union absent approval of the employees who choose him as their representative in the first place. It cannot be over emphasized that the Act protects the right of employees to be represented by persons of their own choice, *Syncon Corp*., 258 NLRB 1159 (1982), and even the Union would be hard pressed to sustain Murray's removal in the absence on this record of any compelling evidence of legitimate considerations to justify such a removal.

In this case, where the Employer's insistence on the shop steward's renunciation of his Section 7 rights as the cost of his job was not based on any valid reasons, but rather, was motivated by expressed displeasure with aggressive advocacy of employee interests in the workplace by the steward, a reason which Respondent sought to shield but which may not form the basis for its conduct, see *Southern California Edison Co*., 307 NLRB 1426 (1992), the violation of the steward's rights under the Act must be sustained. I do so, and conclude that Respondent has thereby committed unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent Cirker's Moving & Storage Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 814, affiliated with International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about January 14, 1991, by conditioning the reinstatement of employee John B. Murray who had been discharged on September 6, 1990, to his former position of employment upon his resignation from his position as union shop steward, Respondent has discriminated, and is discriminating, in regard to the hire and tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action shall include an order that Respondent make John B. Murray whole for any loss of earnings suffered by him by reason of Respondent's unlawfully conditioning Murray's reinstatement to his prior employment as driver on his relinquishing his right to act as union steward as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp*., 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as Murray, but for Respondent's unlawful conditioning of his reinstatement, would have been reinstated as driver, I shall also recommend an order that Respondent offer him reinstatement.[2] Additionally, I shall recommend that Respondent, notify the Union, in writing, with a copy to Murray, that it has no objection to Murray resuming his position as the Union's steward, and expunge from its files all references to his discharge and notify Murray, in writing, that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Cirker's Moving & Storage Co., Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Conditioning the reinstatement to employment or the employment of any employees on their relinquishing their right to act as union steward.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John B. Murray immediate and full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent position, without prejudice to his seniority or other rights, privileges, or working conditions, and make him whole for any loss of pay or other benefits he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Notify Local 814, affiliated with International Brotherhood of Teamsters, AFL–CIO, in writing, with a copy to John B. Murray that it has no objection to Murray resuming his position as the Union's steward.

(c) Remove from its files any reference to the discharge of John B. Murray and notify Murray, in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ana-

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[2] Unlike the facts in *Aces Mechanical Corp*., cited supra, which resulted in a limited Board remedy ordering no reinstatement and backpay only for the period from Respondent's conditioning employee O'Toole's continued employment on his relinquishing his right to act as union steward until the issuance of an arbitration award which sustained his discharge for just cause, Cirker's unlawful conditional offer of reinstatement was for an indefinite period of time and, if accepted, would have obviated the necessity of proceeding to the arbitration on Murray's earlier discharge. Contrary to Respondent's argument appearing at p. 27 of its brief, in offering to reinstate Murray, albeit coupling that offer with an impermissable condition attached, Respondent was condoning Murray's prior conduct which resulted in his initial discharge. No impediment was placed in the way of his resuming his chauffeur duties so long as he resigned his union position. Respondent was thus prepared to accept Murray back in its employ, and but for Murray's objection to the unlawful condition imposed he would have resumed his job. Under such facts, the only appropriate remedy placing the parties in the position they would have been but for the unlawful conduct is to require Murray to be offered reinstatement.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

lyze the amount of backpay due under the terms of this Order.

(e) Post at its office and place of business in New York, New York, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''